CLASSIFICATION OF RIGHTS AND WRONGS.[1]

II.

SOMETHING still remains to be said upon the subject of rights, but it will be convenient first to consider the wrongs by which rights may be infringed.[2] Such wrongs are divisible into two classes, namely, torts and breaches of obligation. A tort is disobedience to a command of the State, and is affirmative or negative, according as the command is negative or affirmative, the tort being in that respect the converse of the command. The State commands every person within its limits to do no act which will infringe an absolute right of any other person, *i. e.*, it prohibits all such acts. Moreover, such acts are the only ones which the State prohibits in the interest of private rights. It follows, therefore, that every infringement of an absolute right is an affirmative tort, and that every affirmative tort is an infringement of an absolute right.

It will be seen, therefore, that an infringement of an absolute right is equally an affirmative tort, whether the right itself be affirmative or negative; and the reason is that the infringement constitutes equally, in either case, an act of disobedience to a prohibitory command of the State. The only important difference between the two cases is that, in the case of an affirmative right, the right exists independently of the command, and the command is issued merely to protect the right, while, in the case of a negative right, the right has no existence until the command is issued, and it is the prohibitory command alone that both creates the right and makes the act of infringement tortious. This difference

[1] Continued from page 556.

[2] The reader must not suppose that a person whose right has been infringed can sue the wrong-doer directly for the infringement; for that would be to punish him for his wrongful act, and he can be punished, if at all, by the State alone. All that the State regards the person wronged as entitled to is a compensation for the wrong, and such compensation it will compel the wrong-doer to make. For that purpose, however, a new right must be created, and, accordingly, the moment an obligation is broken or a tort committed, the law imposes upon the wrong-doer an obligation, in favor of the person wronged, to compensate him for the wrong, and it is upon this that the latter sues. Such rights are created solely for the sake of the remedy, and are, therefore, commonly called remedial rights. It is scarcely necessary to say that they do not come within the scope of this article.

between an affirmative and a negative right is attended with some important consequences,[1] but they do not relate to the nature of the act which will constitute an infringement of the right.

The State also commands every person within its limits to do every act which the State makes it his duty to do. Indeed, to command one to do a thing, and to make it his duty to do it, are one and the same thing, each necessarily implying the other. Moreover, as all duties are affirmative, all commands to do one's duty are also affirmative, and these are the only affirmative commands which the State issues. It follows, therefore, that, as every breach of duty is a negative tort, so every negative tort is a breach of duty.[2]

An impression seems always to have prevailed that a tort must necessarily be an affirmative act;[3] and the explanation of this seems to lie in the fact that duties and their true nature have received so little attention. Certainly, the impression appears to rest upon no more solid foundation, for no reason can be given for regarding disobedience to an affirmative command as any less tortious than disobedience to a negative command. At all events, there is no doubt whatever that every breach of duty is a tort. This is conclusively proved by the fact that the only action that will lie for a breach of duty is the Action on the Case;[4] and this again is not the least convincing proof of the correctness of the view heretofore stated as to the legal nature of a duty, and as to the radical difference between a duty and an obligation.[5] It also explains a phenomenon which has caused much difficulty to courts and lawyers, namely, that, in certain classes of actions, in which the defendant has committed no affirmative wrong, — for example, actions against common carriers, innkeepers, or professional persons, — the plaintiff often has an option between framing his action in contract and in tort. It also explains the fact that certain

[1] If these consequences had been attended to by the authors of the original copyright Act (8 Anne, c. 19), and the Act had accordingly been so drawn as to revest in the authors of published books the affirmative right which they were supposed to have lost by publication, instead of a new negative right, *i. e.*, the exclusive right of multiplying copies, some serious evils would have been avoided. See *infra*, pp. 668–9.

[2] See *infra*, p. 678, note.

[3] Accordingly, an attempt has been made to give the breach of a duty the appearance of an affirmative tort by terming it a subtraction. Thus, Blackstone considers the breach of any duty which is imposed upon one person for the benefit of land belonging to another as a fifth species of injury to real property (the first four being ouster, trespass, nuisance, and waste), and he treats of such breaches in B. 3, c. 15, — which chapter is entitled, "Of Subtraction." So the canonists speak of the subtraction of tithes, of legacies, of conjugal rights, and of church rates.

[4] See *supra*, p. 543, n. 1.

[5] See *supra*, pp. 542–3.

classes of torts may be affirmative or negative, according as they consist of affirmative acts or of mere breaches of duty; for example, any tort committed by a tenant for life or for years as such, against the owner of the reversion, is termed waste; and this may consist either of affirmative acts which injure the reversion (*i. e.*, wilful or voluntary waste), or in a failure to perform the duty of keeping the property in as good a condition as it was in when it first came into the tenant's possession (*i. e.*, involuntary or permissive waste).

The infringement by an obligor of the right created by a personal obligation incurred by him is the only infringement of a right which does not constitute a tort, and hence it is distinguished from all others by being termed simply a breach of obligation. Hence also the remedy, for it is not (as for the infringement of all other rights) an action *ex delicto*, but an action *ex contractu*. This seems to prove conclusively that the State is not supposed to command the performance of obligations. It also proves the existence of the wide difference between obligations and duties which has been herein contended for.[1]

As torts are affirmative or negative, according as the commands which they infringe are negative or affirmative, the one being the converse of the other, so breaches of obligation are negative or affirmative, according as the obligation is affirmative or negative, the one being the converse of the other.

It remains to speak of the infringement of relative rights regarded as absolute rights. Such infringements always constitute affirmative torts;[2] but they chiefly occur in connection with real obligations. Indeed, as real obligations consist merely in authorizing something to be done, the doing of which the obligor (being an inanimate thing) has no power to prevent or even obstruct, it may be correctly said that a real obligation is incapable of being broken; and, therefore, every infringement of the right created by a real obligation, whether it be by the owner of the *res*, which is subject to the obligation, or by a stranger to the obligation, is necessarily an affirmative tort.

It has been seen that, in the case of personal obligations and duties, the infringement of the right is precisely the converse of the right itself, and, therefore, if one knows what the right is, he will necessarily know what will be an infringement of it; and, if one knows what will be an infringement of the right, he will also

[1] See *supra*, pp. 542–3.

[2] See Lumley *v.* Gye, 2 El. & Bl. 216; Bowen *v.* Hall, 6 Q. B. D. 333.

know what the right itself is. An infringement is not necessarily, indeed, coëxtensive with the right, but, so far as the infringement goes, the correspondence between it and the right is perfect. In the case of absolute rights, however, *i. e.*, in all cases in which the infringement of the right is an affirmative tort,[1] the correspondence is not between the right and its infringement, but between the latter and a prohibitory command issued by the State for the protection of the right. While, therefore, the fact that an affirmative tort has been committed is sure proof that the act which constituted it had been prohibited, and also that the right which it infringed was neither an obligation of the person committing the act, nor a duty imposed upon him, it does not necessarily furnish any further proof as to the nature or extent of the right infringed. Nor will the most perfect knowledge of the nature and extent of a right, any infringement of which will be an affirmative tort, necessarily enable one to say what acts will, and what will not, constitute an infringement of the right. It follows, therefore, that, in order to determine, in a given case, whether an affirmative tort has or has not been committed, it may be necessary, first, to identify the right which has been infringed (if there have been an infringement), and to ascertain its legal nature and extent, and, secondly, to ascertain whether the act which has been committed is an infringement of that right; and the accomplishment of the first of these objects may afford no material aid in accomplishing the second.

There is also another reason why an affirmative tort is apt to involve greater legal difficulty than a negative tort or a breach of obligation, namely, that it is more difficult to identify the right infringed, and ascertain its legal nature and extent. Obligations and duties are all of human creation, and it is the business of those who create them to mark out their extent; and, if they neglect to do so, they are liable to be visited with the consequences of their negligence. Hence it seldom happens, when an obligation or duty is admitted to exist, that any question arises as to its extent; and it is scarcely possible in the nature of things that any question should arise as to its identity. Persons and other corporeal things, on the other hand, exist in nature, and the rights to which they give rise have always and everywhere existed, and the State has seldom done more than passively recognize their existence. As to personal rights, the State does not, as has been seen,[2] attempt to enumerate, define, or limit them, nor even to ascertain their exist-

[1] There is, however, one exception to this. See *infra*, p. 668.

[2] See *supra*, p. 538.

ence further than is from time to time found necessary for the purpose of protecting them. As to corporeal things, other than human beings, the State recognizes individual ownership of them, and, as to movable things, this seems to be all that is necessary; but individual ownership of land implies a division of it among its different owners, and accordingly the State recognizes any division which the owners may make, and, if they cannot agree upon a division, the State itself makes the division; and thus the lateral extent of each person's ownership may be definitely ascertained. But it is also necessary to ascertain how far the individual ownership of land extends vertically, and, as to that, the State has established the rule that it extends downwards to the centre of the earth, and upwards to the heavens (*usque ad cœlum*),[1] and also that this is presumptively the vertical extent of the ownership of every person who owns the surface of a given piece of land, though the contrary may be proved. The State also permits an owner of land, as such, as we have seen, to acquire rights in the land of his neighbor, — which rights the State declares to be accessory, appendant, or appurtenant to his ownership of his own land, and which are known in our law as easements and profits.

Perhaps the reader will think there is nothing in the foregoing to cause any uncertainty or confusion in regard to rights of property in land, and perhaps also he will be right in so thinking. Unfortunately, however, uncertainty and confusion do exist upon this subject, whatever may be their cause, and it is hoped that the following observations will have a tendency to lessen them.

First. Ownership of Blackacre (for example) constitutes only a single legal right. It may be said, indeed, that such ownership gives to the person in whom it is vested a right to do a great variety of things, but that only means that it enables him to do them without committing a tort, and that it renders tortious any act which prevents his doing them, or obstructs him in doing them; and it is by virtue of the one right of ownership that any act done by the owner of Blackacre is rightful, which without such ownership would be tortious; and it is the same one right that is infringed by any act which is a tort to the owner of Blackacre as such, and which, in the absence of such ownership, would be rightful as against him.

Secondly. If, therefore, the owner of Blackacre has two or more rights, which are liable to affect the legal relations between him

[1] See *supra*, p. 539.

as the owner of Blackacre and the owner of Whiteacre, which adjoins Blackacre, it is because he has one or more rights in Whiteacre, — which rights are appendant or appurtenant to such ownership. Moreover, such rights must have been acquired either by the present owner of Blackacre, or by some preceding owner, and they can have been acquired only in two ways, namely, either by grant from a person who had the power to create the right, *i. e.*, from the owner of Whiteacre, or by prescription, *i. e.*, by enjoyment so long continued as to be in law equivalent to a grant.

It follows, therefore, that the so-called right of support from adjoining land, whether for land or for buildings, has no existence as a right separate and distinct from the ownership of the land or buildings to be supported, unless it be a right in the land which is to give the support, and that such a right can exist only by a grant from the owner of such land or by prescription. It also follows that the so-called right of support for land from adjoining land, whether the support be lateral or vertical, has no existence as a right in the land which is to give the support, as it is admitted that such right, if it exists at all, exists independently of either grant from the owner of such land or of prescription. It also seems to follow that the so-called right to support from adjoining land for buildings, whether the support be lateral or vertical, cannot exist, except as a right in the land which is to give the support, and that, as such a right, it cannot exist by prescription, unless the support enjoyed be such as would have enabled the owner of the land giving the support, prior to the acquisition of the right, to maintain an action for an affirmative tort, and that is something which practically never happens.

It also follows that there is no such thing as the ownership of a stream of water which flows over one's land, or of that part of it which flows over one's land, separate from the ownership of the land of which it forms a part, though there may be a right in the land of one's neighbor, in respect of such stream, and such right may consist (for example) either in a right to prevent the natural flow of the stream from the land above to one's own land, or in a right to prevent its regular and natural flow from one's own land to the land below.[1]

While, however, the ownership of Blackacre constitutes only one legal right, yet that right may be infringed in many ways. It has just been seen, for example, that such ownership enables the person

[1] Wright *v.* Howard, 1 Sim. & Stu. 190; Mason *v.* Hill, 3 B. & Ad. 304, 5 Id. 1.

in whom it is vested to do a variety of acts, and it may now be added that the State forbids any other person either to do any of those acts, or to obstruct the owner in doing any of them, and any disobedience of this command will, of course, be an affirmative tort committed against the owner of Blackacre as such. Suppose, then, A and B are adjoining owners of land, and A makes an excavation in his land, and thereby causes the soil of B to fall into the excavation. Does A thereby infringe B's right of ownership? It is clear, both upon principle and authority,[1] that he does. What is the nature of the tort which he commits? Clearly, it is trespass *quare clausum fregit;* for, though he does not personally enter B's close, yet the physical effect of his act extends into it, and thus produces important consequences. Suppose A, by means of artificial support, prevents B's soil from falling into the excavation? Then A commits no tort; and this proves, if proof be needed, that B has no right in A's land. Suppose the excavation produces no effect upon B's land for two years, but at the end of two years B's soil falls into the excavation? It is settled by the highest authority[2] that the whole tort is committed at the latter date, and consequently that the Statute of Limitations then first begins to run in favor of A; and this proves that the tort consists, not in making the excavation, but in causing B's soil to fall into it, and consequently that the right infringed is B's ownership of his own land, and not any right of his in A's land.

Suppose the surface of certain land belongs to A, while all the minerals under the surface belong to B, or that the upper part of a house belongs to A, while the lower part belongs to B, and B so conducts his mining as to cause A's soil to sink, or so conducts the repairs of his part of the house as to cause A's part to fall? It must be regarded as settled by authority[3] that B will be liable to A in either case; and yet it is assumed that A has acquired no right in B's part of the land, nor in his part of the house, whether by reservation, grant, or prescription; and, therefore, it must follow

[1] Gale on Easements, Part 3, c. 4, s. 1, of the 6th and 7th eds., and Part 1, c. 6, s. 4, subs. 1, of the previous eds.

[2] Bonomi *v.* Backhouse, E. B. & E. 622, 646, 9 H. L. Cas. 503. The decision of this case in the Queen's Bench was in the defendant's favor, Wightman, J., dissenting; but, on error to the Exchequer Chamber, the judgment was unanimously reversed. On error to the House of Lords, the judges were summoned, and they delivered their unanimous opinion in favor of affirming the judgment of the Exchequer Chamber, and for the reasons given by that court. The House itself also took the same view, and, therefore, the judgment was unanimously affirmed.

[3] Humphries *v.* Brogden, 12 Q. B. 739, and see Rowbotham *v.* Wilson, 8 H. L. Cas. 348.

that the causing of the surface of the land to sink, or of the upper part of the house to fall, is a tort to A's right of ownership. It seems also to be so upon principle; for, if the State is to permit so artificial and inconvenient a division of land or houses to be made between different owners, it must, in all reason, afford some protection to one who owns the surface only of land, or the upper part only of a house; and, therefore, the State is supposed to forbid the owner of the minerals, in the first case, to do anything which shall cause the surface of the land to sink, and to forbid the owner of the lower part of the house, in the second case, to do anything which shall cause the upper part to fall. It seems also that the State is supposed to impose upon the owner of the lower part of the house the duty of keeping it in such a state of repair that it will afford a sufficient support for the upper part.

Suppose A and B are adjoining owners of land, and B builds a house on his land extending to the boundary line between B and A, and then A makes an excavation in his land, but leaves a space between the excavation and the boundary line which would have been sufficient to prevent B's soil in its natural state from falling, but which proves insufficient to support the land with the house on it, and consequently the house falls? It is generally admitted[1] that A is not to be regarded as having caused B's house to fall, and so has not infringed B's right of ownership, and, therefore, that he is not liable to B, unless the latter has acquired by prescription or grant a right in the land of A to have his house supported by it; and it seems to be clear upon principle that no such right can be acquired by prescription, unless it can be shown that the pressure of the house, prior to the acquisition of the right, caused such a disturbance of A's soil as to render B liable in trespass; but this cannot be asserted upon authority.[2]

[1] However, in Angus *v.* Dalton, 6 A. C. 740, 804, Lord Penzance said: "If this matter were *res integra*, I think it would not be inconsistent with legal principles to hold, that where an owner of land has used his land for an ordinary and reasonable purpose, such as placing a house upon it, the owner of the adjacent soil could not be allowed so to deal with his own soil by excavation as to bring his neighbor's house to the ground."

[2] Angus *v.* Dalton, 3 Q. B. D. 85, 4 Id. 162, 6 A. C. 740. In this case, it was finally held that a right to lateral support from adjoining land may be acquired by twenty years' uninterrupted enjoyment for a building proved to have been newly built, or altered so as to increase the lateral pressure, at the beginning of that time; and that it is so acquired if the enjoyment is peaceable, and without deception or concealment, and so open that it must be known that some support is being enjoyed by the building. There was, however, much diversity in the views expressed by the judges, and still more in the reasons by which they supported them. In the Queen's Bench Division, one judge was for the plaintiff and two for the defendant; in the Court of Appeal, two for the plaintiff and one

If the owner of Blackacre have rights in Whiteacre, which adjoins Blackacre, and the owner of Whiteacre commit an affirmative tort against the owner of Blackacre, how shall it be ascertained whether the right infringed is the ownership of Blackacre, or some right which such owner has in Whiteacre? By ascertaining whether the tort was committed on Blackacre or on Whiteacre; and this depends, not upon where the act which constitutes the tort was done, but where it produced its tortious effect Thus, if the tort consist in making soap on Whiteacre, or in manufacturing thereon bones into a fertilizer, or in burning bricks thereon, or in fouling the water of a stream which flows through Whiteacre, and thence into Blackacre, and sending it into Blackacre in its foul condition, or in making a dam in a stream which flows from Blackacre into Whiteacre, and thereby flooding Blackacre, — in each of these cases, it is plain that, while the tortious act is committed on Whiteacre, yet its tortious effect is produced wholly on Blackacre, and hence the right infringed is the ownership of Blackacre. On the other hand, if the tort consist in erecting a house on Whiteacre by which the access of light and air to ancient windows on Blackacre is obstructed, or in obstructing a way which the owner of Blackacre has over Whiteacre, it is plain that the tortious effect of the wrongful act is produced on Whiteacre; and, therefore, the right infringed is the easement of light and air in the first case, and the right of way in the second case.[1] In the second case, also, the owner of Whiteacre, if he wishes to contest the right claimed by the owner of Blackacre, may, instead of obstructing the way, sue the owner of Blackacre for trespass *quare clausum fregit;* and then the owner of Blackacre will have to set up as a defence the right of way which he claims. In case of some easements, moreover, this is the only course open to the owner of Blackacre. Thus, in the case just put

for the defendant. And, though the judges who delivered opinions in the House of Lords agreed substantially in their conclusions, yet they differed greatly in their reasons, and one of them (Lord Justice Fry), while holding himself bound by the authorities to declare his opinion in favor of the plaintiff, yet also declared the rule, which he conceived to be established by those authorities, to be absurd and irrational, and one member of the House (Lord Penzance) entirely agreed with him. These circumstances do not, indeed, derogate from the authority of the decision within the United Kingdom, but elsewhere it is conceived that they ought to affect its authority very materially.

[1] These distinctions were lost sight of by Sir L. Shadwell, V. C., in delivering his judgment in Sutton *v.* Lord Montfort, 4 Sim. 559, 564; for while the case before him was one of obstructing an easement of light, and while the question he was considering was one which could arise only in cases in which the right infringed was an easement or other incorporeal right, yet he referred to the case of the owner of Whiteacre committing a nuisance against Blackacre, by making soap or grinding bones, as in point.

of fouling the water of a stream, as well as in that of erecting a dam across a stream in Whiteacre, and thereby flooding Blackacre, the owner of Blackacre has no means of preventing the act which he claims to be wrongful, and, therefore, if he wishes to contest the right of the owner of Whiteacre to do as he has done, the only course open to him is to sue the latter, and thus compel him to set up as a defence the right which he claims.

The ownership of incorporeal things differs, in respect to its infringement, from that of corporeal things, for the former can be infringed only by interfering with the owner's enjoyment of the thing owned; and, therefore, in order to ascertain in how many and what ways such a right can be infringed, one must ascertain in how many and what ways it can be enjoyed. The common law right of an author in his literary creations furnishes a good illustration of this. An ordinary literary composition can be enjoyed by its author to his profit in only one way, namely, by printing and selling copies of it; and, therefore, it is only by multiplying copies of it without the author's leave that his right can be infringed. The author of a dramatic composition may, however, enjoy it to his profit in another way, namely, by producing it on the stage, and, therefore, his right may be infringed either by multiplying copies of his composition, or by producing it on the stage, without his leave.

There is, moreover, one species of incorporeal ownership which is like a relative right in this respect, that it can be infringed in one way only, and that its infringement is precisely the converse of the right itself, namely, a monopoly or exclusive right granted by the State, *i. e.*, a negative absolute right; for, as such a right consists merely in the power to prevent any one else from doing what the grantee of the monopoly has the exclusive right to do, it is only by doing something to which the monopoly extends that the right of such grantee can be infringed. In this respect, therefore, a monopoly is strictly analogous to a negative personal obligation. By incurring a negative obligation, the obligor deprives himself of the right to do something as between himself and the obligee; by granting a monopoly the State deprives all persons within its limits, except the grantee of the monopoly, of the right to do something as between them and such grantee. For example, a copyright is simply a monopoly of the right of multiplying copies of a printed book; and, therefore, it is no infringement of an author's copyright in a published drama to produce such drama on the stage. It follows, therefore, that a copyright in a published drama is by no means equal, even while it lasts, to an author's common law

right in an unpublished drama. Of course, the State might have revested in the authors of published books, for a limited period, the right which it declared them to have lost by publication, and the title[1] of the original copyright act[2] indicates that the legislature which passed it supposed that that was what it was doing; but all that the act really did was to vest in authors of published books the exclusive right of multiplying copies of them;[3] and a consequence was that, for more than a century,[4] the publication of a drama deprived its author of all exclusive right of producing it on the stage. Another consequence was, that it required two statutes, and the creation of two rights, to replace, for a limited period, the one common law right which the author of a drama was held to have lost by publishing the drama. It may be further remarked that the two statutory rights are inferior to the one common law right, not only because of their limited duration, but also because they do not extend beyond the limits of the State which creates them, while the common law right is good everywhere.

There are some affirmative torts which are clearly infringements of rights of property, but which consist, not in injuring anything which belongs to another, but in wrongfully depriving another of something which belongs to him, or in wrongfully intercepting something which would otherwise come to another, and yet under such circumstances that the person injured cannot be restored to what he has thus been wrongfully deprived of, and, therefore, he must content himself with a compensation in money, *i. e.*, damages. In such cases, therefore, while the tort is clearly to property, yet it is not a tort to any particular thing, nor has it properly any relation to any particular thing. It is, therefore, a tort to the estate of the person injured in the aggregate, — to the *universitas* of his estate (as the Romans called it), consisting, as it does, in making him so much poorer. Of this description are many species of fraud, for example, the so-called infringement of a trade-mark, or of good-will, — which consists in wrongfully and fraudulently depriving another person of customers whose patronage he would otherwise have received.

In all such cases, it is very important that it be clearly under-

[1] "An Act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned."

[2] 8 Anne, c. 19 (1709).

[3] "Shall have the sole right and liberty of printing such book and books for the term of," etc. S. 1.

[4] Namely, in England, until 1833, when 3 & 4 Will. IV. c. 15, was passed; in the United States, until the passage of the Act of 1856, c. 169. 11 Stats. 138.

stood that the tort is not to any specific thing; for, otherwise, one will be in danger of deceiving himself as to the nature of the right injured, — of persuading himself, indeed, that the injury is to a right which in truth has no existence. Thus, in cases of infringement of trade-mark or good-will, it has often happened that, as it was assumed that some specific thing must be injured, so it was concluded that a trade-mark or good-will is a species of incorporeal property, — a notion which clearly has no solid foundation. There may, indeed, be other reasons for the notion than the one just stated. For example, it has been found convenient to apply to trade-marks the nomenclature which had become familiar in connection with patent rights and copyrights, and the practice of doing so has suggested and made plausible the idea that the former were analogous to the two latter. So, also, trade-marks and good-will have often been spoken of and treated as proper subjects of purchase and sale. It is, however, only by a figure of speech that either of these can be said to be purchased or sold, and what is called a purchase and sale of a trade-mark or good-will is in truth only a contract, by which (for example) the so-called seller agrees to retire from business, and to introduce the so-called purchaser to his former customers and to the public as his successor.

What has thus far been said of rights and their infringement has in it no element of equity. The rights which have been described may be defined as original and independent rights, and equity has no voice either in the creation of such rights or in deciding in whom they are vested. Equity cannot, therefore, create personal rights which are unknown to the law; nor can it say that a thing, which by law has no owner, is a subject of ownership, nor that a thing belongs to A which by law belongs to B; nor can it create an obligation or impose a duty which by law does not exist; nor can it declare that a right arising from an obligation is assignable, if by law it is not assignable. To say that equity can do any of these things would be to say that equity is a separate and independent system of law, or that it is superior to law.

If there is no element of equity in a given right, neither is there any in the infringement of that right; for what is an infringement of a right depends entirely upon the extent of the right. If, therefore, equity could declare that a right has been infringed when by law it has not, it would thus enlarge the right of one man, and curtail that of another.

When, however, it is said that equity has no voice in a given question, it must not be inferred that a judge sitting in equity has

no such voice. An equity judge administers the same system of law that a common law judge does; and he is therefore constantly called upon to decide legal questions. It, accordingly, sometimes happens that courts of equity and courts of common law declare the law differently; and a consequence of this may be that courts of equity will recognize a certain right which courts of common law refuse to recognize; but it does not follow that the right thus recognized is properly an equitable right. So courts of equity may treat an act as an infringement of a legal right, which courts of common law treat as rightful; but it does not follow that such an act is properly an equitable tort. A well-known instance of such an act is found in what is commonly called equitable waste. For example, if a tenant for life, without impeachment of waste, cut down ornamental trees, or pull down houses, a court of equity says he has committed waste, while a court of common law says he has not. Either court *may* be wrong, and one of them *must* be; for the question depends entirely upon the legal effect to be given to the words, "without impeachment of waste," and that cannot depend upon the kind of court in which the question happens to arise. Yet the practical consequence of this diversity of views is, that there is a remedy in equity against the tenant in the case supposed, while there is none at law; and this gives to the act of the tenant the semblance of being an equitable tort. In truth, however, the act is a legal tort, if the view taken by courts of equity is correct, while it is a rightful act, if the view taken by courts of common law is correct.

As legal rights have in them no element of equity, so equitable rights have in them no element of law. In short, legal rights and equitable rights are entirely separate and distinct from each other, each having a source and origin of its own, — legal rights being the creatures of the law, *i. e.*, of the State, and equitable rights being the creatures of equity. What then is the nature of equitable rights, and how can equitable rights and legal rights coëxist in the same State? This question suggests another, namely, what is the nature of equity, and how can law and equity coëxist in the same State? As law is the creature of the State, so equity was originally the creature of the supreme executive of the State, *i. e.*, of the king. What then was the power of the king which enabled him to create equity? It may be answered that he had in him the sole judicial authority, as well as the sole executive power, but none of the legislative power (*i. e.*, he could not alone exercise any portion of the latter). By virtue of his judicial

power, he had entire control over procedure, so long as the legislature did not interfere; and this it was that enabled him to create equity. As he had no legislative power, he could not impart to his decisions in equity any legal effect or operation, but when he had, by the exercise of his judicial authority, rendered a decision in equity in favor of a plaintiff, he could enforce it by exerting his executive power against the person of the defendant, *i. e.*, he could compel the defendant to do, or to refrain from doing, whatever he had by his decision directed him to do or to refrain from doing.

The subject must, however, be examined a little more closely. The cases in which equity assumes jurisdiction over controversies between litigants may be divided into two great classes, namely, those in which a plaintiff seeks relief in equity respecting some legal claim which he makes against the defendant, and those in which he makes no such claim. In the first class of cases, the ground upon which equity takes jurisdiction is that the plaintiff either can obtain no relief at all at law, or none which is adequate; and, therefore, so far as regards this class of cases, equity consists merely in a different mode of giving relief from that employed by courts of common law, *i. e.*, in a different mode of protecting and enforcing legal rights; and, therefore, the exercise of this branch of the jurisdiction has already been sufficiently accounted for.

The other class of cases, however, is not so easily disposed of. It may be divided into those in which the plaintiff sets up no legal right whatever, and those in which the only legal right he sets up is a defence to some legal claim which the defendant makes against him. In cases belonging to the first subdivision, equity interferes upon the ground that the substantive law (and not merely the remedial law) is inadequate to the purposes of justice. In cases belonging to the second subdivision, equity interferes upon the ground that justice requires that the plaintiff should be permitted to take the initiative in the litigation, and procure a decision of the controversy in a suit brought by himself, instead of being compelled to wait the pleasure of the defendant in suing him at law, and then to set up his defence. In one important particular, however, cases belonging to these two subdivisions are alike, namely, in the necessity which they impose upon equity of creating a new right in the plaintiff's favor; for no action or suit can be maintained in any court without some right upon which to found it. Moreover, such right must consist of a claim to be enforced against the defendant, and not merely of the means of defeating a claim which the defendant makes against the plaintiff, *i. e.*, of a defence.

How then is the difficulty to be met? In early times, probably, the difficulty itself was not much felt. Perhaps, indeed, it was not felt at all, it not being perceived that the king could properly issue judicial commands only in support of some right. At the present day, however, the question whether any given action or suit will lie must be answered in one of three ways, namely, first, by showing some right in the plaintiff on which the suit can rest; secondly, by saying that it will not lie; or, thirdly, by saying it is an anomaly; and the cases in which the plaintiff asserts no legal claim against the defendant are too numerous to be disposed of in that way.

Can equity then create such rights as it finds to be necessary for the purposes of justice? As equity wields only physical power, it seems to be impossible that it should actually create anything. It seems, moreover, to be impossible that there should be any other actual rights than such as are created by the State, *i. e.*, legal rights. So, too, if equity could create actual rights, the existence of rights so created would have to be recognized by every court of justice within the State; and yet no other court than a court of equity will admit the existence of any right created by equity. It seems, therefore, that equitable rights exist only in contemplation of equity, *i. e.*, that they are a fiction invented by equity for the promotion of justice. Still, as in contemplation of equity such rights do exist, equity must reason upon them and deal with them as if they had an actual existence.

Shutting our eyes then to the fact that equitable rights are a fiction, and assuming them to have an actual existence, what is their nature, what their extent, and what is the field which they occupy? 1. They must not violate the law. 2. They must follow the analogy of one or more classes of legal rights. 3. There is no exclusive field for them to occupy; for the entire field is occupied by legal rights. Legal and equitable rights must, therefore, exist side by side, and the latter cannot interfere with, or in any manner affect, the former. 4. They must be such as can be enforced by the exercise of physical power *in personam;* for, as equity has no other means of enforcing rights, it would be in vain for it to create rights which could not be so enforced. 5. Propositions one and four prove that no equitable rights can be created, even by way of fiction, in analogy to either class of absolute rights, nor in analogy to real obligations; and, though expressions are often met with which seem to indicate the contrary, yet they must be regarded as mere figures of speech. 6. All equitable rights

must, therefore, be in the nature either of personal obligations or of duties. 7. Equitable rights clearly constitute but one class, and, therefore, they must all be classed either as personal obligations or as duties. 8. They bear some analogy to duties but more to personal obligations; and, therefore, they must be classed as equitable personal obligations. They are analogous to duties in this respect, namely, that, as duties will be imposed whenever the State sees fit to impose them, so equitable rights will be created, subject to the limitations herein-before and herein-after stated, whenever equity finds it necessary to create them. In all other respects, however, they are analogous to personal obligations. 9. There is no division of equitable obligations answering to the division of legal obligations into those which are *ex contractu* and those which are *ex lege;* for a contract always produces a legal obligation. Therefore, all equitable obligations may be said to be *ex æquitate.* 10. An equitable obligation cannot impose a general personal liability upon the obligor, as that would be in violation of law. Therefore, while a covenant by a purchaser of land with his vendor, that no building shall ever be erected on the land other than a dwelling-house, will bind in equity all subsequent owners of the land until it comes into the hands of a purchaser for value and without notice of the covenant, yet a covenant by such purchaser with his vendor, that a dwelling-house shall be erected on the land, within a specified time, at a cost of $10,000, will bind no one in equity whom it will not bind at law.[1] 11. An equitable obligation, therefore, can bind the obligor only in respect of some right vested in him; and, therefore, every right created by an equitable obligation is derived from, and dependent upon, some other right vested in the obligor. Moreover, every original equitable right is derived from, and dependent upon, a *legal* right vested in the obligor. In short, every equitable right is derived, either mediately or immediately, from a legal right; and, while an indefinite number of equitable rights may be derived from one legal right, yet they will all be dependent upon that one legal right.

It is not, however, all legal rights that can be the subjects of equitable obligations. Only those can be so which are alienable in their nature. Of absolute rights, therefore, none of those which are personal can ever be the subjects of equitable obligations, while nearly all rights which consist in ownership can be the

[1] Tulk *v.* Moxhay, 2 Ph. 774; Haywood *v.* Brunswick Building Soc., 8 Q. B. D. 403; L. & S. W. R. Co. *v.* Gomm, 20 Ch. D. 562, 582, 586, 587; Austerberry *v.* Oldham, 29 Ch. D. 750.

subjects of such obligations. Relative rights can generally be the subjects of equitable obligations, but not always. For example, some rights arising from real obligations are inseparably annexed to the ownership of certain land, and, therefore, are not alienable by themselves. So, also, some rights arising from personal obligations are so purely personal to the obligee as to be obviously inalienable. It is only necessary to mention, as an extreme case, the right arising from a promise to marry.

If a legal right is capable of being the subject of an equitable obligation, the power of equity to impose an obligation upon the owner of it as such is subject to one limitation only, namely, that which is imposed by law. Under what circumstances, then, can an equitable obligation be imposed upon the owner of a legal right as such without violating the law? Whenever the owner of the right has received it by way of gift, but not for his own benefit, or has obtained it by fraud or other wrong, or has received it by way of gift, or without payment of value, from one who was himself bound by an equitable obligation respecting it, or has received it for value from a person so bound, but with notice that the latter was so bound. So, also, if the owner of a legal right incur a legal obligation respecting it, equity can, subject to the qualification stated in proposition ten, enforce that obligation against all subsequent owners of the right, until the latter reaches the hands of a purchaser for value and without notice. So, also, if the owner of a right has incurred a legal obligation to transfer it to another, and everything has been done, and all things have happened, necessary to transfer the right, if it were equitable, equity will treat the right as having passed in equity, though not at law, and, therefore, will impose upon its owner an obligation to hold it for the benefit of the legal obligee.

By an unfortunate anomaly it is also now held that the owner of a legal right may, by a mere declaration in writing to that effect, incur an equitable obligation respecting that right in favor of a person between whom and himself there has been no previous relation, and from whom he receives no consideration.[1] This is as much in violation of law as the case mentioned in proposition ten. Moreover, it is in effect enforcing an agreement which has no consideration to support it.

If A convey land to B, and the conveyance be expressed to be in consideration of money paid by B to A, but in fact the money was

[1] Lewin on Trusts (10th ed.), 68.

paid as a loan, and not as the price of the land, the inference will be irresistible that the conveyance was made merely to secure the repayment of the money lent; and, therefore, the moment the conveyance is made, B will incur an equitable obligation to hold the land for A's benefit, subject to his own rights as A's creditor, *i. e.*, there will be a resulting trust in favor of the debtor.

If land be conveyed by a debtor to his creditor upon a condition subsequent, namely, that the title conveyed shall revest in the debtor on his paying the debt on a day named, or upon an agreement by the debtor to reconvey the land on payment of the debt on a day named, and the day be permitted to pass without payment, equity will, the moment that the debtor's legal right is thus lost, impose an obligation upon the creditor to reconvey the land upon being paid "principal, interest, and costs"; and this obligation will continue in force till equity itself puts an end to it. The principle upon which equity does this is that the debtor has lost his legal right as a penalty for not paying the debt on the day named, that the debt still remains unpaid, and, therefore, if equity does not interfere, the debtor, having lost his land, will also be compelled to pay the debt, if he have the means of doing so, — in which event he will receive nothing for his land. It may be objected that equity here violates the legal rights of the creditor by converting a penalty, agreed upon between the parties, into a mere security for the payment of a debt; but the answer is that the objection comes too late, for equity has in this manner relieved against all penalties from the earliest times, and its action in that respect has been acquiesced in by the legislature. For example, by the common law the obligor in a bond, who failed to pay on the day named in the bond, became in consequence liable to pay twice the amount of the original debt, but equity would always restrain an action to recover the penalty on payment of "principal, interest, and costs"; and the interference of equity in this way was not only acquiesced in, but its view was adopted by the legislature, and became statute law, more than two hundred years ago.[1]

If payment of a debt be secured by a pledge of the debtor's property, and also by the obligation of a personal surety, and the surety pay the debt, equity will compel the creditor to deliver the pledge to him, and not to the debtor, though the latter has a clear legal right to receive it, the debt being paid and extinguished; *i. e.*, equity destroys the legal right of the debtor, and converts the

[1] Namely, by 8 & 9 Will. III. c. 11, s. 8.

creditor into a trustee for the surety. This is done upon the theory that the debt is not paid by the surety, but is purchased by him, and that he is, therefore, entitled to the pledge as an incident of the debt. This, however, is only a fiction, — a fiction, moreover, which is contrary to law; for the payment by the surety extinguishes the debt. Equity does this under the name of subrogation, and perhaps her best justification is that she borrowed both the name and the thing from the civil law. Equity has, moreover, followed the civil law in carrying the doctrine of subrogation still further; for it permits a surety who has paid the creditor, and thus extinguished the debt, to recover a full indemnity from the debtor, and that too on the theory that the debt still remains due from the latter, and that the surety is enforcing the rights of the creditor.

In all the foregoing cases the obligation imposed by equity upon the owner of a legal right is affirmative, *i. e.*, it is an obligation to hold the legal right for the benefit of the equitable obligee, in whole or in part. There are cases, however, in which the object of equity is not to compel the owner of a legal right to hold the same for the benefit of another, but to restrain him from exercising it for his own benefit; and, whenever that is the case, the obligation imposed will of course be negative. Thus, if a debtor fraudulently procure from his creditor a release of the debt, or procure such release for a consideration which he afterwards refuses or fails to pay or perform, equity will impose upon him an obligation not to use the release as a defence to an action or suit by the creditor to recover the debt. So equity will impose upon a defendant to an action or suit an obligation not to use a defence which will prevent a trial of the case upon its merits, or by which the course of justice will otherwise be obstructed. So, if a legal claim be of such a nature that it may be the subject of an indefinite number of actions, and if it has already been litigated sufficiently to satisfy the purposes of justice, equity will impose upon the unsuccessful party an obligation not to prosecute the claim further, or not to resist it further, as the case may be.[1]

When an equitable right has once been created, it may in its turn become the subject of a new equitable right, *i. e.*, its owner may incur an equitable obligation in respect to it, just as the owner

[1] The rights mentioned in the text, namely, the right to bring an action, and the right to defend one's self against an action, seem to be personal rights. If they are not, they relate to procedure, and hence do not come within the scope of this article. See Holland, Jurisprudence, Part 2, c. 15.

of a legal right may incur an equitable obligation in respect to that; and this process may go on indefinitely, each new equitable right becoming in its turn the subject of still another equitable right, and all the equitable rights being derived from the same legal right, the first immediately, the others mediately.

If equitable rights are to be classed as obligations rather than as duties, it will follow that infringements of such rights are to be regarded as breaches of obligation. Perhaps, however, it is not very material whether they be regarded as breaches of obligation or as equitable torts; for, whether they be the one or the other, it seems that the relief which equity will give will be the same. For equity never gives damages for an infringement of an equitable right, but makes the wrong-doer a debtor to the person wronged instead, and proceeds upon the theory of compelling the former to restore to the latter what he has lost, or to place him in the situation in which he would have been if the wrong had not been committed.

C. C. Langdell.

NOTE.

At page 660, the writer inadvertently omitted to say that, as the infringement of a private duty is a negative tort, so the infringement of a public duty is a negative crime; and that, as the former is redressed by means of an action of tort, so the latter is punished by means of an indictment. See Couch *v.* Steel, cited *ante*, p. 543, n. 1.